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DISCRIMINATION LAW—IMPERMISSIBLE USE OF THE BUSINESS NECESSITY DEFENSE AND THE BONA FIDE OCCUPATIONAL QUALIFICATION

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INTRODUCTION

Title VII of the Civil Rights Act of 1964[1] prohibits employment discrimination based upon race, color, religion, sex, pregnancy, or national origin.[2] Although the statute does not define discrimination,[3]

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1. Congress enacted the Civil Rights Act, Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1982 & Supp. 1987)), in response to over two hundred years of oppression and discrimination directed toward minorities in general and blacks in particular. *See* Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COMM. L. REV. 431 (1966). Early advocates had been trying unsuccessfully to pass fair employment practice (FEP) legislation since the 1940's. *Id.* at 431. Finally, in two messages to Congress, President Kennedy urged legislative relief and supported FEP legislation. 109 CONG. REC. 11,174, 11,178 (1963). The Civil Rights bill, "H.R. 7152, was introduced in the House . . . the day after the President submitted his . . . message." Vaas, *supra*, at 434. The bill went through a series of amendments, aggressive efforts to postpone its consideration in the House, and a fourteen day discussion in the Senate on whether it should be considered. *Id.* at 443-44. After a protracted debate on the merits and a vote with *every* legislator present, Title VII was passed on July 2, 1964. 110 CONG. REC. 15,897 (1964). For a list of hearings and reports in which FEP legislation was sought and defeated prior to 1964, see Vaas, *supra*, at 431 n.2. *See also* H.R. REP. NO. 914, 88th Cong., 1st Sess. 16-18, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2355, 2392 (listing dates of civil rights hearings before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives).

2. Title VII provides that:

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(a) (1982). Notwithstanding their explicit inclusion among the classes of protected individuals, women continued to be exposed to discrimination that was based upon pregnancy. Consequently, Congress enacted the Pregnancy Discrimination Act (PDA) amendment to Title VII which extended the list of protected classes to include pregnant women. Pregnancy Discrimination Act, Pub. L. No. 95-555 § 1, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1982)). The PDA provides in pertinent part that:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions

the courts have developed two distinct theories of liability. A Title VII plaintiff may allege either one of these two theories. The easier to prove is disparate treatment, or intentional discrimination, which has three forms. The first is straight forward, facial discrimination, which will be called overt disparate treatment.[4] A plaintiff must simply show that an employment policy openly discriminates against a protected class and that he or she is a member of that class.

The second and third forms of disparate treatment are closely related. They are more subtle and slightly more complicated to prove because they are covert. To prove the second form, the plaintiff establishes prima facie discrimination by showing (1) that he or she belongs to a protected group, (2) that he or she applied for and was qualified for a job, but was rejected, and (3) that the employer continued to search for applicants. This creates a presumption of unlawful discrimination. The burden of proof shifts to the employer to articulate a nondiscriminatory reason for the rejection. Finally, the plaintiff may attempt to prove that the proffered reasons are not the true reasons for his or her rejection. If the plaintiff succeeds, he or she has proved intentional discrimination or covert disparate treatment.

The third form of disparate treatment is also covert and is quite rare. The plaintiff must show that a facially neutral employment policy (1) has a disparate impact on a protected class, (2) that he or she is a member of that group, and (3) that the employer's business reasons for the policy are a pretext or a cover-up for a hidden intent to discriminate. This form of disparate treatment also will be called covert disparate treatment.[5]

The second theory of liability available to a Title VII plaintiff is disparate impact, which is unintentional discrimination. To prove disparate impact, the plaintiff must show that a facially neutral employment policy (1) has a disparate impact on a protected class, and (2) that he or she is a member of that class.[6]

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shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefits programs, as other persons not so affected but similar in their ability or inability to work . . . .

42 U.S.C. § 2000e(k) (1982).

3. Stonefield, *Non-Determinative Discrimination, Mixed Motives and the Inner Boundary of Discrimination Law*, 35 BUFF. L. REV. 85, 86 n.1 (1986).

4. For a more complete discussion of overt disparate treatment, see *infra* note 20 and accompanying text.

5. For a more complete discussion of covert disparate treatment, see *infra* notes 21-29 and accompanying text.

6. For a more complete discussion of the disparate impact theory, see *infra* notes 45-50 and accompanying text.

Each of the two theories has its own defense. An employer who is accused of disparate treatment (either overt or covert) can avoid liability by using the bona fide occupational qualification defense (BFOQ).[7] The use of this defense is restricted, however, and can be asserted only when the employer discriminates against religion, sex, pregnancy, or national origin. It does not apply to race claims.[8] Similarly, an employer who is accused of disparate impact can avoid liability by using the business necessity defense (BND). This defense is not restricted. It applies to disparate impact against all protected groups. Consequently, the analysis of a Title VII discrimination claim requires that a court determine which theory of liability the plaintiff is asserting and to which protected class the plaintiff belongs.

Normally the plaintiff in a Title VII claim is a member of only one of the protected classes. For example, a black male employee might allege race discrimination, or a pregnant female employee might allege sex discrimination. A court's analysis of such claims is likely to be reasonably well guided by statute. On the other hand, a black pregnant female employee is a member of one protected group because of her race and is a member of another protected group because of her pregnancy. This plaintiff might allege both race and sex (pregnancy) discrimination in a single claim. Furthermore, this plaintiff also might base her action upon both disparate treatment and disparate impact.

A recent decision by the United States Court of Appeals for the Eighth Circuit provides an example of a Title VII claim which included the two legal theories, the two defenses and, most significantly, a plaintiff who was a member of two protected classes.[9] In *Chambers v. Omaha Girls Club, Inc.*,[10] the plaintiff, Ms. Chambers, was a black female employee who became pregnant shortly after the Omaha Girls Club (Girls Club) adopted a written policy, the Role Model Rule, stating that single pregnant staff members would be fired.[11] Ms. Chambers was fired. She sued the Girls Club, alleging disparate impact and disparate treatment in her race and sex claim.[12] The trial court found,[13] and the court of appeals agreed,[14] that Ms. Chambers proved

7. For a discussion of the BFOQ, see *infra* notes 30-43 and accompanying text.

8. For the text of the Title VII section which describes the bona fide occupational qualification, see *infra* note 30. For evidence that the BFOQ is not an affirmative defense to discrimination against race or color, see *infra* note 32.

9. *See* Chambers v. Omaha Girls Club, Inc., 834 F.2d 697 (8th Cir. 1987).

10. 834 F.2d 697 (8th Cir. 1987).

11. *Id.* at 699 n.2.

12. For a more complete description of the *Chambers* facts and the court's analysis, see *infra* notes 63-123.

13. Chambers v. Omaha Girls Club, 629 F. Supp. 925, 949 (D. Neb. 1986) ("The

disparate impact. Even though the trial court's finding of disparate impact was based upon race, neither the trial court nor the court of appeals discussed the discrimination in terms of "race" or "sex." Moreover, neither court mentioned or seemed to notice that the Role Model Rule was overtly discriminatory against sex (pregnancy). The Court of Appeals for the Eighth Circuit affirmed the trial court's dismissal of Ms. Chambers' claim, concluding that the Girls Club successfully answered the claim because the Role Model Rule was justified by business necessity and also was a bona fide occupational qualification.[15]

This note examines the *Chambers* decision. Section I explains the two theories of liability and their respective defenses. Section II sets out the facts of *Chambers*. It describes the court's reasoning and identifies the tests that the court used to evaluate the Girls Club's assertion of the BFOQ and the BND. Finally, in Section III, this note discusses how the court failed to notice which of the two theories of liability supported the sex claim and which supported the race claim. The note argues that the failure to separate the sex claim from the race claim led to impermissible use of the defenses. It suggests a brief analytical framework designed to simplify the handling of race and sex claims in a single action. It argues further that the tests for finding the BND and the BFOQ that the *Chambers* court used did not conform to the Supreme Court standards for finding these defenses. As a result, the *Chambers* decision sets a precedent that exposes a vulnerable, although protected, group—black women—to increased possibility of wrongful discrimination.

I. THE LEGAL THEORIES AND DEFENSES PERTINENT TO RACE AND SEX CLAIM ANALYSIS

A. *The Disparate Treatment Theory and the Bona Fide Occupational Qualification*

As stated above, a plaintiff may bring a Title VII discrimination claim under one of two distinct theories of liability.[16] The first of these

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Court finds that because of the significantly higher fertility rate among black females the rule banning single pregnancies would impact black women more harshly.").

14. *Chambers*, 834 F.2d at 701 ("Chambers established the disparate impact of the [R]ole [M]odel [R]ule.").

15. *Id.* at 703, 705.

16. *See* Connecticut v. Teal, 457 U.S. 440 (1982). The *Teal* Court said that:

> It is well established under Title VII that claims of employment discrimination because of race may arise in two different ways. An individual may allege that he has been subjected to "disparate treatment" because of his race, or that he has

theories, disparate treatment, was the immediate focus of Title VII.[17] "[It] . . . is the most easily understood form of discrimination. The employer simply treats some employees less favorably than others because of their race, color, religion, sex [pregnancy], or national origin. Proof of discriminatory motive is critical . . . ."[18] Disparate treatment may be proved in three ways (one overt and two covert), each requiring that the plaintiff prove intent to discriminate.[19] Under the easiest method, overt disparate treatment, the plaintiff must prove that an employment policy or practice is facially discriminatory.[20] In other words, the plaintiff must establish plain, overt, intentional discrimination (overt disparate treatment).

Under the second method of proving disparate treatment, the first covert disparate method, the plaintiff must prove that an employment policy contains a hidden intent to discriminate. The Supreme Court discussed the more common form of covert disparate treatment in *Texas Department of Community Affairs v. Burdine*.[21] There the Court said that the plaintiff "has the burden of proving . . . a prima facie case of discrimination."[22] He does this by showing that he belongs to a racial minority, applied for and was qualified for a job, was rejected, and the employer continued to seek applicants.[23] The *Burdine* Court stated further that if the plaintiff succeeded in proving this prima facie discrimination by a preponderance of the evidence, the burden shifts to the employer to articulate a legitimate nondiscrimina-

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been a victim of a facially neutral practice having a "disparate impact" on his racial group.

Id. at 457 (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 581-82 (1978) (Marshall, J., concurring in part)).

17. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). "Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII." *Id.* at 335 n.15. *See also* 110 CONG. REC. 13,088 (1964) (remarks of Sen. Humphrey). "What the bill does . . . is simply to make it an illegal practice to use race as a factor in denying employment. It provides that men and women shall be employed on the basis of their qualification . . . ." *Id.*

18. *International Bhd. of Teamsters*, 431 U.S. at 335 n.15.

19. United States Postal Serv. Bd. of Govs. v. Aikens, 460 U.S. 711 (1983). "The 'factual inquiry' in a Title VII case is '[whether] the defendant intentionally discriminated against the plaintiff.' " *Id.* at 715 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

20. "[F]acial discrimination, in which the policy explicitly discriminates," is prima facie discrimination. Note, *Employment Discrimination—Title VII's Limited Preemptive Effect Allows State Laws Mandating Pregnancy Leave and Reinstatement: California Federal Savings and Loan Association v. Guerra, 107 S. Ct. 683 (1987)*, 9 U. ARK. LITTLE ROCK L.J. 669, 672 n.25 (1987).

21. 450 U.S. 248 (1981).

22. *Id.* at 252-53.

23. *Id.* at 253 n.6.

tory reason for the rejection. If the defendant employer succeeds, the plaintiff then has the opportunity to prove that the reasons offered were not true reasons.[24]

Finally, the Supreme Court discussed the third and most rare form of disparate treatment in *Connecticut v. Teal*.[25] According to the *Teal* Court, a plaintiff must first prove that a facially neutral employment policy or practice has a significantly adverse impact on a protected group.[26] If the plaintiff succeeds in showing this adverse impact (disparate impact), the burden of proof shifts to the defendant, who may assert a legitimate business necessity for the policy or practice.[27] Finally, if the plaintiff can prove that the employer's business reasons are pretextual, he or she has proved intentional discrimination, or covert disparate treatment.[28] The important element is discriminatory intent.[29]

When Congress enacted Title VII, it included a statutory defense to Title VII's proscriptions. That defense is the bona fide occupational qualification which is available for disparate treatment against reli-

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24. *Id.* at 252-53.

25. 457 U.S. 440 (1982).

26. *Id.* at 446.

27. *Id.* at 446-47.

28. *Id.* at 447. This formula for finding disparate treatment through the multi-step process is widely accepted by the courts of appeals. *See, e.g.*, Johnson v. Legal Serv. of Ark., Inc., 813 F.2d 893, 896 (8th Cir. 1987); Netterville v. Missouri, 800 F.2d 798, 802-03 (8th Cir. 1986); Bluebeard's Castle Hotel v. Government of the Virgin Islands, Dep't of Labor, 786 F.2d 168, 171 (3d Cir. 1986); White v. Colgan Elec. Co., 781 F.2d 1214, 1217 (6th Cir. 1986); Meiri v. Dacon, 759 F.2d 989, 997 (2d Cir. 1985); Easley v. Anheuser-Busch, Inc., 758 F.2d 251, 256 n.10 (8th Cir. 1985); Robinson v. Polaroid Corp., 732 F.2d 1010, 1014 (1st Cir. 1984); McKenzie v. Sawyer, 684 F.2d 62, 71 (D.C. Cir. 1982). One commentator also has summarized this formula. *See* Note, *supra* note 20, at 672 n.25 (stating that if a business policy is facially neutral but has disparate impact and the plaintiff can show that reasons given are pretextual, there is discrimination). "Both facial discrimination and pretext cases are called 'disparate treatment.' " *Id.*

29. Chambers v. Omaha Girls Club, Inc., 834 F.2d 697, 703 (8th Cir. 1987) ("While the disparate impact theory does not require discriminatory intent, the disparate treatment theory does."). Section 604.1(a) of the EEOC Compliance Manual defines disparate treatment by stating that:

> Discrimination within the meaning of Title VII of the Civil Rights Act of 1964 can take many forms. It can occur when an employer or other person subject to the Act intentionally excludes individuals from an employment opportunity on the basis of race, color, religion, sex, or national origin. . . . The presence of a discriminatory motive can be inferred from the fact that there were differences in treatment.

EEOC Compl. Man. (BNA) § 604.1(a) (1981). "To prove disparate treatment, the charging party must establish that [the employer's] actions were based on a discriminatory motive." *Id.* § 604.2.

gion, sex, or national origin.[30] During debate on the House floor, Representative McClellan suggested that the BFOQ apply to all five protected groups,[31] but it was specifically disallowed as a defense to discrimination that is based upon "race" and "color."[32]

If the plaintiff proves intent to discriminate (disparate treatment), either by showing that an employment practice is facially discriminatory or by showing that the reasons given for a facially neutral policy or practice are pretextual, an employer may avoid liability by proving that the offensive employment policy or practice is a bona fide occupational qualification. Consequently, the BFOQ allows for lawful discrimination on the basis of "sex"[33] when "sex" (or nonpregnancy) "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[34]

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30. 42 U.S.C. § 2000e-2(e) (1982) provides that:

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of [their] religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

Id.

31. *See* 110 CONG. REC. 13,825 (1964) (remarks of Rep. McClellan). In an attempt to dilute the effect of Title VII, Representative McClellan suggested that the BFOQ should apply to race, color, religion, sex, and national origin. *Id.*

32. Vaas, *supra* note 1, at 438 n.28. "Representative Williams of Mississippi proposed amending the [BFOQ] amendment by the inclusion . . . of the words 'race' and 'color.' This proposal was defeated, the debate thereon making it abundantly clear that *under no circumstances* may 'race' or 'color' be considered a 'bona fide occupational qualification' under new law." *Id.* (emphasis added). *See generally* 110 CONG. REC. 2550-63 (1964) (House discussion on inclusion of race and color in the BFOQ exception).

West's Federal Practice Manual states:

> The . . . [BFOQ] makes no reference to race or color even though these classifications are repeatedly covered within the protected groups covered by that section and other sections of the statute. This divergent treatment is particularly significant, because a companion subsection provides that no preferential treatment will be given to the protected groups but specifically includes race and color within these groups. 42 U.S.C.A. § 2002-2(j). Inferentially, therefore, a bona fide occupational qualification exception cannot be based upon race or color.

11 WEST'S FEDERAL PRACTICE MANUAL § 16,333, at 155 (C.D. Philos ed. 1980). *See also* EEOC Compl. Man. (BNA) § 625.1 (1982) ("The protected class of race is not included in the [BFOQ] statutory exception and clearly cannot, under any circumstances, be considered a BFOQ for any job.").

33. The BFOQ also is available for discrimination based on religion or national origin. Those classifications, however, are beyond the scope of this note. *See* 42 U.S.C. § 2000e-2(e) (1982).

34. 42 U.S.C. § 2000e-2(e) (1982). According to the Equal Employment Opportunity Commission (EEOC), the BFOQ is appropriate "where only individual[s] of one sex, religion, or national origin can perform the duties and functions of the job in question." EEOC Compl. Man. (BNA) § 604.10(c) (1982).

Even though the BFOQ provides for lawful sex discrimination under some circumstances, its legislative history suggests that the defense should be used with caution.[35] Moreover, the Equal Employment Opportunity Commission (EEOC)[36] published guidelines which stated that the BFOQ is permissible only in extremely rare instances.[37] The Supreme Court of the United States supported this narrow interpretation in *Dothard v. Rawlinson*[38] by expressing deference to the EEOC standards and by describing it as the "narrowest of exceptions."[39] Additionally, the *Dothard* Court formulated certain tests for finding the BFOQ. It stated that for sex to be a bona fide occupational qualification the employer must show that the " '*essence* of the busi-

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35. Section [2000e-2(e)] provides for a *very limited exception* to the provisions of the title. Notwithstanding any other provisions, it shall not be an unlawful employment practice for an employer to employ persons of a particular religion or national origin in those rare situations where religion or national origin is a bona fide occupational qualification.

H.R. REP. NO. 914, 88th Cong., 1st Sess. 27, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2403 (emphasis added). *See generally* 110 CONG. REC. 7213 (1964) (Interpretative Memorandum of Senators Clark and Case advocating a narrow interpretation of the BFOQ).

36. For the purpose of the EEOC and the source of its authority, see *infra* note 56.

37. 29 C.F.R. § 1604.2(a) (1989). "The commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly." *Id.* The EEOC Compliance Manual expanded on the requirement that the BFOQ be used narrowly. It says that:

> Title VII provides an exception to its prohibition of discrimination based on sex, religion, or national origin. That exception, called the bona fide occupational qualification (BFOQ), recognizes that in some *extremely rare instances* a person's sex, religion, or national origin may be reasonably necessary to carrying out a particular job function in the normal operation of an employer's business or enterprise.

EEOC Compl. Man. (BNA) § 625.1 (1982) (emphasis added).

38. 433 U.S. 321 (1977). In *Dothard*, a woman applied for a position as a correctional counselor in a men's prison. *Id.* at 323. The job entailed maintenance of security and control over inmates by "continually supervising and observing their activities" in all locations, such as "communal showers and toilets" and by strip searching the prisoners who re-enter the prison buildings. *Id.* at 326-27. The environment was a "jungle atmosphere" with "rampant violence." *Id.* at 334. Many of the prisoners were sex offenders who had assaulted women in the past and were perceived to be a danger to a female correctional counselor. *Id.* at 335. The *Dothard* Court concluded that because of the extreme conditions in the prison, sex was a BFOQ for the job. In other words, correctional counselors must be male. *Id.* at 336-37.

39. *Id.* at 334. The *Dothard* Court was persuaded by "the restrictive language of [the BFOQ] . . . , the relevant legislative history, and the consistent interpretation of the Equal Employment Opportunity Commission—that the [BFOQ] exception was in fact meant to be an *extremely narrow exception* to the general prohibition of discrimination on the basis of sex." *Id.* (emphasis added). It recognized that the lower federal courts maintain the "virtually uniform view . . . that [the BFOQ] provides only the narrowest of exceptions to the general rule requiring equality of employment opportunities." *Id.* at 333 (footnote omitted).

ness operation would be undermined by not hiring members of one sex exclusively.' "[40] The *Dothard* Court stated further that "an employer could rely on the [BFOQ] exception only by proving 'that he had reasonable cause to believe, that is, *a factual basis for believing*, that all or substantially all women would be unable to perform *safely* and *efficiently* the *duties of the job* involved.' "[41]

Even though the *Dothard* Court allowed sex to be used as a BFOQ, it confined that holding to the harsh facts of *Dothard* in which a woman applied to be a correctional counselor in a maximum security Alabama prison.[42] Moreover, there is a strong dissenting opinion in which Justice Marshall objected to justifying sex discrimination, even in extreme circumstances. Justice Marshall sent a message to the lower courts cautioning them to restrict the use of the BFOQ to the narrow facts of *Dothard*.[43] As illustrated in *Chambers v. Omaha Girls Club, Inc.*,[44] at least one court of appeals ignored this message.

The plaintiff in *Chambers* brought her claim under the disparate impact theory in addition to the disparate treatment theory. Therefore, it is necessary to have an understanding of disparate impact and its business necessity defense before examining the *Chambers* case.

B. *The Disparate Impact Theory and the Business Necessity Defense*

To succeed with the disparate impact theory, the plaintiff must

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40. *Id.* at 333 (quoting Diaz v. Pan American World Airways, 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971)).

41. *Id.* (quoting Weeks v. Southern Bell Tel. & Tel., Co., 408 F.2d 228, 235 (5th Cir. 1969)) (emphasis added).

42. *Id.* at 334-37. For a brief summary of the *Dothard* facts, see *infra* note 38.

43. Writing the dissenting opinion in *Dothard*, Justice Marshall cautioned against the use of the BFOQ. He accused the majority of:

> perpetuat[ing] one of the most insidious of the old myths about women—that women, wittingly or not, are seductive sexual objects. . . . It is women who are made to pay the price in lost job opportunities for the threat of depraved conduct by prison inmates. Once again, "[t]he pedestal upon which women have been placed has . . . , upon closer inspection, been revealed as a cage."

Id. at 345 (quoting Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 20, 485 P.2d 529, 541 (1971) (Marshall, J., concurring in part and dissenting in part).

In addition, Justice Marshall concluded with a pointed message to the lower courts by stating that they must:

> recognize that the [*Dothard*] decision was impelled by the shockingly inhuman conditions in Alabama prisons, and thus that the "extremely narrow [BFOQ] exception" recognized here, will not be allowed "to swallow the rule" against sex discrimination. Expansion of today's decision beyond its narrow factual basis would erect a serious roadblock to economic equality for women.

Id. at 347 (Marshall, J., concurring in part and dissenting in part) (citation omitted).

44. 834 F.2d 697 (8th Cir. 1987).

prove that a facially neutral employment policy has a significant adverse impact on a protected group[45] and that he or she is a member of that group.[46] Such a showing establishes prima facie discrimination.[47] The Supreme Court introduced Title VII disparate impact analysis in *Griggs v. Duke Power Co.*,[48] where black employees objected to promotional test requirements.[49] The *Griggs* Court said that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[50]

The *Griggs* Court also introduced the business necessity defense which is the proper defense to a disparate impact Title VII claim.[51] It said that if an "employment practice which operates to exclude Negroes *cannot be shown to be related to job performance*, the practice is prohibited."[52] In addition, an employer must prove that any given employment policy has a "*manifest relationship to the employment in question*."[53] In *Washington v. Davis*,[54] the Court added that demonstrating some "*rational basis*" for disparate impact is insufficient.[55] According to the *Davis* Court, it is necessary that hiring and promotion practices that have a disparate impact on blacks be " '*validated' in*

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45. Griggs v. Duke Power Co., 401 U.S. 424 (1971). "[Title VII] proscribes . . . practices that are fair in form, but discriminatory in operation." *Id.* at 431. To prove disparate impact, the plaintiff "must show that a facially neutral employment practice has a significant adverse impact on a protected minority group." Chambers v. Omaha Girls Club, Inc., 834 F.2d 697, 700 (8th Cir. 1987).

> 46. The ultimate issue in [*Chambers*] is whether the [Role Model Rule] permitting the termination of single employees who become pregnant, or cause a pregnancy, unlawfully discriminates against the plaintiff, individually, or has an unlawfully discriminatory impact upon a class of women or black women, *of which the plaintiff is a member.*

Chambers v. Omaha Girls Club, 629 F. Supp. 925, 943 (D. Neb. 1986) (emphasis added).

47. *Griggs*, 401 U.S. at 430. "Under the [Civil Rights] Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained . . . [if they have a discriminatory impact]." *Id. See also* Connecticut v. Teal, 457 U.S. 440 (1982). In *Teal*, four black employees of the Department of Income Maintenance complained that a test given to them disproportionately excluded blacks. Each of them had been provisionally promoted to Welfare Eligibility Supervisor but had to be tested to attain permanency. *Id.* at 445-46. The *Teal* Court held that "[w]hile there was no showing that the employer had a racial purpose . . . these requirements . . . were invalid because they had a disparate impact." *Id.* at 446.

48. 401 U.S. 424 (1971).

49. *Id.* at 430-32.

50. *Id.* at 431.

51. *Id.*

52. *Id.* (emphasis added).

53. *Id.* at 432 (emphasis added).

54. 426 U.S. 229 (1976).

55. *Id.* at 247 (emphasis added).

terms of job performance."[56]

A recent Supreme Court decision discusses the allocation of the burden of proof between plaintiff and defendant in a business necessity defense and sets a standard which makes it easier for the defendant to avoid liability. In *Wards Cove Packing Company, Inc. v. Atonio*,[57] plaintiffs alleged that an employer discriminated against non-white cannery workers.[58] Although the Court ultimately held that the cannery workers did not make out a prima facie case of disparate impact,[59] it remanded the case with instructions to the lower court on how it should analyze the employer's assertion of the BND if the cannery workers prove disparate impact at retrial.[60]

The *Wards Cove* Court said that "the employer carries the burden of producing evidence of a business justification for his employment practice. The burden of persuasion, however, remains with the disparate-impact plaintiff."[61] The effect of this dicta is to lighten the burden on the defendant/employer once the plaintiff/employee has proved disparate impact. All the employer must do is articulate some legitimate business reasons for the offensive employment practice. According to the *Wards Cove* Court, the burden then shifts back to the plaintiff to prove that those business reasons are false or that there is an alternative means to accomplish the business goals.[62]

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56. *Id.* (emphasis added). *See also* EEOC Guidelines, 29 C.F.R. § 1604.10(c) (1989) (stating that business necessity is met when the employer shows that the discriminatory requirement has a manifest relationship to the employment in question). The EEOC is a federal agency created by the Civil Rights Act of 1964. It is charged with the enforcement of Title VII. 42 U.S.C. § 2000e-4(a) (1982).

57. 109 S. Ct. 2115 (1989).

58. *Id.* at 2119.

59. *Id.* at 2121-22.

60. *Id.* at 2124.

61. *Id.* In his dissenting opinion, Justice Stevens points out that the *Griggs* Court placed the burden of persuasion on the employer. *Wards Cove*, 109 S. Ct. at 2127 (Stevens, J., dissenting). In *Wards Cove*, the Court was speaking hypothetically about what the employer's burden would be if the plaintiff *proved* disparate impact. Shifting the burden of persuasion back to the plaintiff differs from the *Griggs* formulation, making it easier for the defendant to succeed with the BND. In response to the *Wards Cove* decision, a bill has been introduced in the Senate that will overturn the ruling and clarify the burden of proof in disparate impact cases. *See* Fair Employment Act, S. 1261, 101st Cong., 1st Sess., 135 CONG. REC. S7512 (June, 1989).

62. *Wards Cove*, 109 S. Ct. at 2127.

II. *CHAMBERS V. OMAHA GIRLS CLUB, INC.* [63]

A. *Facts*

According to the findings of the trial court, the Girls Club of Omaha is a "private, non-profit, tax exempt corporation" that serves girls between the ages of eight and eighteen. Its staff conducts educational, vocational, and social programs that are designed to help the "young girls reach their full potential."[64] While the Girls Club's stated purpose is to "provide behavioral guidance and to promote the health, education and vocational and character development of girls, regardless of race, creed or national origin," it also boasts that its "extensive contact and the close relationships which often develop between the staff and the members . . . differentiate it from schools and other youth programs."[65] Staff members "act as role model[s]" to the counselees with the expectation that the girls will emulate their behavior.[66] In addition to the role modeling, staff members are required to adopt the Girls Club's philosophies, among which is the belief "that teenage pregnancy limits life's options for a young woman."[67]

In 1981, after two of the Girls Club's single staff members became pregnant, the Girls Club instituted Rule Eleven, or the Role Model Rule,[68] which said that pregnancies of single women were grounds for

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63. 834 F.2d 697 (8th Cir. 1987).

64. Chambers v. Omaha Girls Club, 629 F. Supp. 925, 928 (D. Neb. 1986).

65. *Id.*

66. 834 F.2d at 699.

67. *Id.* The Girls Club's objectives are to:

1. Create a safe and stable environment that fosters trusting relationships and individual value development through interaction with peers and adults.
2. Develop and implement programs to enable girls to build positive self esteem through skill development and application.
3. Make available quality health programs so girls may understand and deal with their own health problems and health maintenance.
4. Establish a climate where girls participate in and experience the decision making process and have broad opportunity to take leadership roles.
5. Provide opportunities for girls to explore the full range of their personal options in family roles and career choices in order to take control of their lives.
6. Encourage a knowledge and understanding of the various cultures in our society. Promote a broad view of responsibility as a citizen of a larger community through education and civic activity.
7. Encourage both individual and group responsibility.

Chambers, 834 F.2d at 698 n.1.

68. The Girls Club's personnel policies contain the following provisions:

MAJOR CLUB RULES

All persons employed by the Girls Club of Omaha are subject to the rules and regulations as established by the Board of Directors. The following are not permitted and such acts may result in immediate discharge:

dismissal.[69] Shortly thereafter, Ms. Chambers, a twenty-two-year old, single staff member, became pregnant, reported the pregnancy to her supervisor, and received a letter of termination.[70]

Ms. Chambers sued the Girls Club in the United States District Court for the District of Nebraska[71] alleging, in addition to constitutional and state law claims, that black single women comprise a class affected adversely by the Role Model Rule.[72] Essentially, she alleged a combination of race and sex-based discrimination.[73]

To show adverse impact on race, Ms. Chambers presented statistical evidence at trial[74] which supported the court's finding of disparate impact. Responding to Chambers' arguments, the Girls Club asserted legitimate business reasons for the Role Model Rule to avoid liability for disparate impact against race.[75]

Ms. Chambers then attempted to prove that those reasons were pretextual by arguing that there were less restrictive means to accom-

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. . .

11. Negative role modeling for Girls Club Members to include such things as single parent pregnancies.

Chambers, 834 F.2d at 699 n.2.

69. Chambers v. Omaha Girls Club, 629 F. Supp. at 929.

70. *Chambers*, 834 F.2d at 699.

71. Chambers v. Omaha Girls Club, 629 F. Supp. at 929. Chambers alleged violations of the:

> first, fifth, ninth and fourteenth amendments of the Constitution of the United States, violations of the Civil Rights Act, 42 U.S.C. 1981, 1983, 1985, 1986 and 1988, and pendant state violations including: bad faith discharge, defamation, invasion of privacy, intentional infliction of emotional distress, and conspiracy to deprive her of a right to a livelihood . . . .

Id.

72. *Id.* at 944.

73. *Id.*

74. Chambers' statistical evidence showed:

> (1) that in 1981 the fertility rate for teenage whites in the Douglas County area was 36.2 per thousand (or 3.6 per hundred) as compared to 107.1 per thousand for non-white teenagers (or 10.7 per hundred), . . . the fertility rate of black teenagers is approximately 2 1/2 times greater than that of whites. With respect to the overall fertility rates, whites as a class are likely to become pregnant approximately seventy percent as often as blacks [that is, for every ten blacks who become pregnant only seven whites become pregnant].
>
> . . .
>
> From these facts, it is possible, even in the absence of more specific data, to conclude that the impact of the [Role Model Rule] would fall more harshly on black women of child-bearing age.

Chambers v. Omaha Girls Club, 629 F. Supp. at 949 n.45.

75. "The Court believes that the [Girls Club's] articulated reason for the [Role Model Rule], i.e., to provide positive role models in an attempt to discourage teenagers from becoming pregnant, is a legitimate, nondiscriminatory reason that was clearly explained." *Id.* at 947.

plish the Girls Club's goals.[76] Responding to Ms. Chambers' arguments, the Girls Club convinced the district court that there were no other, less restrictive means to accomplish its goals.[77]

Ms. Chambers further argued that the Role Model Rule was a cover for animus towards black women,[78] and thus, that the Girls Club should be held liable for covert disparate treatment. The Girls Club maintained that it was not intentionally discriminating against black women.[79]

Additionally, Ms. Chambers argued that there was no evidence to show that the Role Model Rule was effective.[80] The Girls Club failed to offer any data to show a relationship between the Role Model Rule and the incidence of pregnancy in counselees.[81] Instead of proving the Rule's efficacy, the Girls Club proposed that empirical data are not required to prove that the Role Model Rule discourages illegitimate pregnancy. It argued that expert testimony is sufficient to justify the Rule, even in the absence of verifying data.[82] Accordingly, the Girls Club called an expert to testify that the Role Model Rule might relieve the problem of teenage pregnancy.[83]

The district court analyzed the case under both the disparate

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76. Chambers argued that she could be given a leave of absence or could be put in a non-contact position, thereby removing herself from contact with the club members and avoiding any negative role model influence. *Chambers*, 834 F.2d at 702.

77. The Girls Club convinced the district court that there were no such non-contact positions, *see supra* note 76, and that a leave of absence would have to be three or four months long to accomplish the desired effect. Training a replacement for Chambers would require six months of on-the-job training. *Id.* at 702-03.

78. To show that the Girls Club's reasons for the Role Model Rule were pretextual, Chambers tried to prove: (1) that the rule required intrusion into the staff members' private lives; (2) that less restrictive alternatives were available such as a leave of absence or transfer of duties; (3) that the rule is applied in an irrational manner, i.e., it applies to single pregnant women but not to single mothers; (4) that the rule promotes abortion and abortion is not a viable option for black women; (5) that the rule impacts black women more harshly; and (6) *that ratification of the rule by the board of directors was an attempt to cover up animus toward the plaintiff.* Chambers v. Omaha Girls Club, 629 F. Supp. at 947 (emphasis added).

79. The Girls Club rebutted the allegations of intentional racial discrimination with the evidence that there was a high percentage of minorities employed by the Club and alleged that percentage was probative on intent. *Id.* at 947-48 n.43.

80. *Chambers*, 834 F.2d at 702.

81. *Id.* at 706-07 (McMillian, J., dissenting) (stating that there is no evidence to support a relationship between teenage pregnancies and the employment of an unwed pregnant instructor).

82. To support this argument, the Girls Club relied upon Davis v. City of Dallas, 777 F.2d 205 (5th Cir. 1985), *cert. denied*, 476 U.S. 116 (1986).

83. Chambers v. Omaha Girls Club, 629 F. Supp. at 951. The expert testified that "because teenagers have a need for 'significant others' outside the home and are *likely* to develop close relationships such as those which are fostered at the Girls Club . . . the role

treatment theory and the disparate impact theory.[84] It discussed disparate treatment analysis first, but without distinguishing the race claim from the sex claim.[85] Ms. Chambers and the Girls Club formed arguments based upon race. Ms. Chambers' argument which she used to show covert disparate treatment contained both race and sex components.[86] Ultimately, the district court found no disparate treatment.[87]

The district court then analyzed the case under the disparate impact theory. It concluded that Ms. Chambers proved disparate impact against black females because a rule banning single, pregnant workers would impact black women more harshly because of their higher fertility rates.[88] The court dismissed the case, however, holding that the Girls Club's reasons for the discrimination were legitimate business reasons,[89] and, therefore, there was no discrimination under Title VII.[90]

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modeling rule *could be* . . . another viable way to attack the problem of teenage pregnancy." *Id.* (emphasis added).

The EEOC has strict requirements for establishing the need for same-sex role models. Because the Pregnancy Discrimination Act made discrimination against pregnancy a violation of Title VII, the same strict requirements, by analogy, apply to "same pregnancy-state" role models. That is, if the Girls Club insisted on having nonpregnant role models, it, by analogy, must follow the same strict guidelines for same-sex role modeling. For a discussion of the EEOC compliance manual requirements with respect to same-sex role models, see *infra* note 154.

84. *Id.* at 946-48, 949-52.

85. *Id.* at 947.

86. *Id.*

87. *Id.* at 947-48.

88. *Id.* at 949. *See supra* note 74.

89. The district court said that to find business necessity, the Girls Club was required to show a "close nexus between the policy in question and a 'substantial goal of the employer.' " Chambers v. Omaha Girls Club, 629 F. Supp. at 949 (citing Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971)). "[T]here must be a 'positive relationship' between the rule or policy and the employer's program.' " *Id.* at 950 (quoting Washington v. Davis, 426 U.S. 229, 250 (1976)). Applying these tests, the court concluded that the Omaha Girls Club:

> established by the evidence that its only purpose is to serve young girls between the ages of eight and eighteen and to provide these women with exposure to the greatest number of available positive options in life. The Girls Club has established that teenage pregnancy is contrary to this purpose and philosophy. The Girls Club established that it *honestly believed* that to permit single pregnant staff members to work with the girls would convey the impression that the Girls Club *condoned* nonmarried pregnancy for the girls in the age group it serves.

Id. at 950 (emphasis added).

90. *Id.* at 952. The district court did not expressly state that the Role Model Rule is justified by the BND. The court of appeals, however, makes it clear that the district court found that it was. *Chambers*, 834 F.2d 697, 703 (8th Cir. 1987). The court of appeals also clarified that the trial court did not find that the Role Model Rule is a BFOQ. *Id.* at 704.

Ms. Chambers appealed to the Court of Appeals for the Eighth Circuit. Even though it affirmed the dismissal of her claim, the court of appeals recognized that Ms. Chambers asserted a "combination of race and sex discrimination . . . in violation of 42 U.S.C. [section] 2000e-2(a)."[91] Furthermore, it is clear from the Chambers' arguments that she alleged intentional race discrimination[92] and intentional sex discrimination.[93]

B. *The Court of Appeals' Analysis*

1. Disparate Impact: Finding the Business Necessity Defense

The court of appeals accepted the district court's finding that Ms. Chambers' statistical evidence proved disparate impact without explicitly stating whether that impact was based upon race or sex.[94] Since the BND is the proper defense for unintentional disparate impact against either race or sex, the court analyzed the case to determine whether the Girls Club had proved business necessity.[95]

The court said that a defendant must satisfy two tests to prove the BND. The first test, formulated by the Supreme Court in *Griggs*, requires the defendant to prove that there is a "manifest relationship [between the challenged employment practice and] . . . the employment in question."[96] The second test forces the defendant to prove

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91. *Chambers*, 834 F.2d at 700.

92. Chambers v. Omaha Girls Club, 629 F. Supp. at 930. At trial, Chambers tried to prove that the Role Model Rule had a disparate impact on *race* and that the Girls Club's reasons for the Rule were pretextual. During its discussion of the parties' arguments, the district court stated that "[t]he plaintiff's evidence of pretext generally tries to establish that the [Role Model Rule] is a cover-up for the Girls Club's 'morality standard' which disapproves of *black* single mothers." *Id.* at 947 (emphasis added). The Girls Club attempted to rebut this evidence by showing that its "work force was *racially* balanced or contained a disproportionately high percentage of *minority* employees . . . ." *Id.* (emphasis added) (citation omitted).

Thus, it is plain from Chambers' argument and from the Girls Club's response that both parties knew that the argument was about *race*.

93. *Chambers*, 834 F.2d at 703. According to the court of appeals:

> Chambers argue[d] alternatively that the district court erred in failing to find a violation of Title VII under the [covert] disparate treatment theory, and that this case [with respect to sex] should not be analyzed under the [covert] disparate treatment theory because Chambers' discharge on account of her pregnancy constitutes [overt, facially discriminatory disparate treatment or] intentional discrimination . . . .

Id. For a discussion of the three methods of showing disparate treatment, see *supra* notes 17-29 and accompanying text.

94. *Id.* at 701.

95. *Id.*

96. *Id.* (quoting Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810, 815 (8th Cir. 1983)

that there is a "compelling need . . . to maintain [the] practice."[97] In addition to these two tests, the court said that the defendant might have to prove that the employment practice is "necessary to safe and efficient job performance"[98] or "that the employer's goals are 'significantly served by' the practice."[99]

The court of appeals accepted the district court's finding that the Girls Club's purpose was to serve young girls and to expose them to life's opportunities.[100] It agreed that the "Girls Club established that it *honestly believed* that to permit single pregnant staff members to work with the [counselees] would convey the impression that the Girls Club condoned pregnancy"[101] and that pregnancy would limit opportunities in life for young girls.[102] Ruling that this "purpose" and this "belief" satisfied the tests for finding the BND, it held that the district court's finding "that the [R]ole [M]odel [R]ule is justified by [the BND] and thus does not violate Title VII under the disparate impact theory is not clearly erroneous."[103]

In addition to accepting the district court's reasoning regarding "purpose" and "belief," the court of appeals concluded that the testimony of an expert witness was sufficient to show a manifest relationship between the Role Model Rule and teenage pregnancy in the absence of any data or validation studies.[104] Thus, it concluded that the Girls Club proved the BND.[105]

(quoting Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)))).

97. *Id.* (quoting *Hawkins*, 697 F.2d at 815 (quoting Kirby v. Colony Furniture Co., 613 F.2d 696, 706 n.6 (8th Cir. 1980))).

98. *Id.* (quoting McCosh v. City of Grand Forks, 628 F.2d 1058, 1062 (8th Cir. 1980) (quoting *Dothard*, 433 U.S. at 332 n.14)).

99. *Id.* (quoting New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979)) (holding that a rule which prohibited methadone users who were participants in a drug rehabilitation program from occupying positions which were "safety-sensitive" was manifestly related to the employment in question). The *Chambers* court cited *Beazer* to support the notion that one way to establish the BND defense is to show that the employer's goals are significantly served by the practice. However, it was the trial court in *Beazer* that discussed goals. *Beazer*, 440 U.S. at 587 n.31. The *Beazer* Court ultimately reaffirmed the *Griggs* test that the practice must be manifestly related to the employment in question. *Id.*

100. *Chambers*, 834 F.2d at 701.

101. *Id.* at 701-02 (emphasis added).

102. *Id.* at 702.

103. *Id.* at 703.

104. *Id.* at 702.

105. *Id.* at 703.

2. Disparate Treatment: Finding the Bona Fide Occupational Qualification

In its analysis of the disparate treatment claim, the court of appeals concluded that Ms. Chambers had not shown that the Girls Club's reasons for the Role Model Rule were pretextual. Thus, there was no intent to discriminate, and therefore, no disparate treatment.[106] Ms. Chambers argued that there was covert disparate treatment on the basis of race and that the contrary finding was erroneous.[107] Additionally, Ms. Chambers argued that her "[sex claim] should not be analyzed under the [covert] disparate treatment theory because [her] discharge on account of her pregnancy constitute[d] intentional discrimination [or overt disparate treatment]."[108] More simply, she argued that there was covert disparate treatment against race and overt disparate treatment against sex.

The court of appeals said that the BFOQ is a defense to either of these two arguments,[109] without discussing the disparate treatment in terms of race or sex. It reasoned, therefore, that even if the lower court erred in finding no disparate treatment,[110] Ms. Chambers could not prevail if the Role Model Rule constituted a BFOQ.[111] Without expressly saying so, the court effectively concluded that the Role Model Rule could justify both covert disparate treatment based upon race and overt disparate treatment based upon sex.

In assessing the validity of the Role Model Rule as a BFOQ, the court said that the Girls Club had to prove that the " '*essence* of the business operation would be undermined' "[112] if single pregnant counselors were not fired. Additionally, the court said that sex or non-

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106. *Id.*

107. *Id.* Even though the *Chambers* court did not specify the basis of the discrimination at this point, it is clear that Chambers was arguing that the court should have found covert racial disparate treatment, see *supra* note 92, and that the error was the court's failure to find racial disparate treatment.

108. *Id.*

109. *Id.* at 703-04 and n.18. The court reasoned that because the BFOQ is the proper defense against intentional discrimination, it is available for covert disparate treatment as well as for the overt disparate treatment. Because the *Chambers* court ultimately found that the Role Model Rule was a BFOQ, it concluded that both Chambers' arguments were answered. *Id.*

110. *Id.* at 704 n.18 ("Even if the district court erred in finding no discrimination under the disparate treatment theory, our conclusion that the role model rule is a bfoq means that there can be no violation of Title VII."). This quoted language refers to the covert disparate treatment argument.

111. *Id.* at 703-04.

112. *Id.* at 704 (quoting Dothard v. Rawlinson, 433 U.S. 321, 333 (1977) (quoting Diaz v. Pan Amer. World Airways, Inc., 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971))).

pregnancy would be a BFOQ when " 'safe and efficient performance of the job would [not] be possible without the challenged employment practice.' "[113] Finally, according to the court, the Girls Club must prove that the Role Model Rule has a " ' "manifest relationship to the employment in question." ' "[114]

Instead of applying the BFOQ tests, however, the *Chambers* court proposed that the analysis of the BFOQ was "similar to and overlaps" the analysis of the BND.[115] It apparently reasoned that because the tests were similar, the BFOQ and the BND are the same. To support this conclusion, the *Chambers* court stated that in one case[116] "manifest relationship" was used to find the BND,[117] while in another case,[118] "manifest relationship" was the test used to find a BFOQ.[119] The court continued its comparison by reasoning that in *Dothard v. Rawlinson*,[120] the Supreme Court applied the "necessary to safe and efficient job performance" test to find both the BND and the BFOQ.[121]

Thus, relying on the similarity in the wording of the tests, the court reasoned that the same facts that support the BND will also support the BFOQ.[122] Consequently, because it was satisfied that the Role Model Rule was justified by the BND, the *Chambers* court concluded that the Role Model Rule also was a BFOQ.[123] According to the court, this conclusion justified its dismissal of Ms. Chambers' case.

III. ANALYSIS

The *Chambers* decision contains two fundamental errors, each of

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113. *Id.* (citing *Dothard*, 433 U.S. at 333 (citing Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969))).

114. *Id.* (quoting Gunther v. Iowa Men's Reformatory, 612 F.2d 1079, 1086 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971))).

115. *Id.* at 704 (quoting *Gunther*, 612 F.2d at 1086 n.8).

116. Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810 (8th Cir. 1983).

117. *Chambers*, 834 F.2d at 704 (citing *Hawkins*, 697 F.2d at 815).

118. Gunther v. Iowa Men's Reformatory, 612 F.2d 1079 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980).

119. *Chambers*, 834 F.2d at 704 (citing *Gunther*, 612 F.2d at 1086). The *Chambers* court cited *Gunther* to show that the test for a BFOQ is the same as for the BND. The *Gunther* court, however, got its test for the BFOQ by citing *Griggs* which was about the BND and not the BFOQ. The Supreme Court applied the "manifest relationship to the employment in question" test to the BND and not to the BFOQ. *See Griggs*, 401 U.S. at 431-32.

120. 433 U.S. 321, 321 (1977).

121. "*Compare Dothard*, 433 U.S. at 332 n.14 (business necessity) *with Dothard*, 433 U.S. at 333 (bfoq)." *Chambers*, 834 F.2d at 704 n.19.

122. *Id.* at 704.

123. *Id.* at 705.

which may lead to increased exposure[124] to discrimination for employees who allege race and sex claims in the same action. The first problem was the court's failure to separate its discussion of the race claim from its discussion of the sex claim. The second error was the court's failure to hold the Girls Club to the Supreme Court's standards for proving the BND. An additional twist to this second error was the court's determination that the BFOQ and the BND are so similar that proving the BND also proves the BFOQ.

A. *Confusing the Claims*

Ms. Chambers was fired for becoming pregnant.[125] As stated in

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124. Women may be particularly exposed to wrongful discrimination, due in part to their last place consideration as members of a protected group. The term "sex" was added to the Civil Rights bill in what was an apparent attempt to keep the bill from passing. 110 CONG. REC. 2577 (1964). *See* Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 TEX. L. REV. 1025 (1977). "On the last day of House debate on the Civil Rights Bill, Representative Smith, a staunch opponent of the Bill, proposed, 'in jest,' the inclusion of 'sex' as a prohibited classification in an attempt to make the Bill unacceptable to as many legislators as possible." *Id.* at 1027 (citations omitted); Vaas, *supra* note 1, at 441-42. "Mr. Smith, long-time Chairman of the House Committee on Rules—and not a civil rights enthusiast—offered his amendment in a spirit of satire and ironic cajolery. In support of the amendment he quoted at length from a letter he had just received from a lady, presumably one of his constituents . . . ." The letter was a complaint about how God did not supply enough men to avoid the plight of spinsterhood, asking Congress if it could help. *Id.* *See also* 110 CONG. REC. 2584 (1964). Arguing that the purpose of Title VII was to protect blacks, Representative Greene stated that "sex" should not be added to the bill without extensive hearings on the biological differences between men and women. *Id.* *See generally* 110 CONG. REC. 2577-84 (1964) (the complete discussion on the House floor pertaining to the passage of Title VII).

125. Before passage of the Pregnancy Discrimination Act, pregnant women were relegated to a "subclass" which was not covered by Title VII. For a discussion of the concept of subclasses within one sex, see Sirota, *supra* note 124, at 1039-42. The author provides an example of how subclasses are created:

> A conservative men's club has an opening for a locker room attendant. It announces that it will hire only nonbearded males. If the fifty women who apply for the position bring a Title VII action, a court should find sex discrimination since the employer's no-female rule burdens the class of all women because of their unique physical characteristics. In this case, however, sex discrimination is permissible and a BFOQ exists, because of the privacy-related requirement that the locker room attendants possess the same unique sexual characteristics as the locker room patrons. The exclusion of all women applicants [may leave, for example] twenty-five bearded and twenty-five nonbearded men competing for the job in the BFOQ-created subclass. If the twenty-five bearded men brought a Title VII action claim for sex discrimination, a court should reject their claim. Since a BFOQ has eliminated all women from competition, discrimination against the bearded males does not reduce their competitive employment opportunities against female applicants. Because the discrimination within a single subclass is on the basis of beards and not sex, Title VII does not prohibit it.

Id. at 1040 (footnotes omitted). Following this reasoning, if an employer favored non-

the Pregnancy Discrimination Act amendment to Title VII,[126] pregnancy discrimination is sex discrimination.[127] Because the Role Model Rule expressly stated that single pregnant counselors would be

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pregnant women over pregnant women, the pregnant women would not have a Title VII claim because they would be discriminated against on the basis of pregnancy rather than on the basis of sex.

126. Congress enacted the Pregnancy Discrimination Act, Pub. L. No. 95-555 § 1, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1982)), in response to a Supreme Court decision which categorized pregnant women as a subclass and excluded them from Title VII protection. General Electric Co. v. Gilbert, 429 U.S. 125, 145-46 (1976) (exclusion of employment benefits of pregnancy-related disabilities did not violate Title VII). *See* California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) (stating that the PDA was enacted in response to the *Gilbert* decision); Newport News Shipbuilding and Dry Dock Co. v. EEOC, 462 U.S. 669, 678-80 (1983) (legislative history of PDA reflecting Congress' disapproval of *Gilbert* in which pregnancy discrimination was allowed); H.R. REP. NO. 948, 95th Cong., 2d Sess. 2, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4749, 4750 (stating that the *Gilbert* Court decided in favor of a disability plan which excluded disabilities based on pregnancy). Congress reacted to the *Gilbert* decision by introducing two bills specifically designed to overrule *Gilbert*. *See* S. 995, 95th Cong., 1st Sess. (1977); H.R. 6075, 95th Cong., 1st Sess. (1977). "[S. 995 which resulted in the PDA] was passed in lieu of [H.R. 6075] after amending its language to contain much of the text of the House bill." H.R. REP. NO. 948, 95th Cong., 2d Sess. 1, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4749. Additional minor differences were resolved by the managers of the House and Senate. *See* H.R. CONF. REP. NO. 1786, 95th Cong., 2d Sess. 3, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4749, 4765. One commentator stated that the *Gilbert* Court "ignored the congressional intent in enacting Title VII of the Civil Rights Act—that intent was to protect individuals from unjust employment discrimination including pregnant workers." Note, *supra* note 20, at 674-75 (citing the statements of Senator Williams, 123 CONG. REC. 2539 (1977) in Staff Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., Legislative History of the Pregnancy Discrimination Act of 1978 2 (1979).

127. 42 U.S.C. § 2000e(k) (1982). For text of the PDA, see *supra* note 2. *See also* 29 C.F.R. § 1604.10(a) (1988) ("A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy, childbirth or related medical conditions is in prima facie violation of Title VII.").

One explanation for the blindness to intentional discrimination based on pregnancy is that the Act was originally and exclusively intended to protect the black race. *See* H.R. REP. NO. 914, 88th Cong., 1st Sess. 15, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2355, 2391. While offering some additional views on the meaning of Title VII, Senators Poff and Cramor stated in a House report that Title VII:

> enumerates a series of acts or omissions on the part of an employer which it declares to be "unlawful employment practices."
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> These include:
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> 1. failure to hire a job applicant on account of his race;
> 2. refusal to hire a job applicant on account of his race;
> 3. discharge of an employee on account of his race;
> 4. discrimination in compensation against an employee on account of his race;
>
> . . .
>
> 13. discrimination on account of race against any individual in an apprenticeship program.

Id. at 107, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS at 2474. Further evi-

fired, it was overt disparate treatment against sex (pregnancy).[128]

The court of appeals referred to Ms. Chambers' Title VII claim as a "combination of race and sex discrimination in the course of employment,"[129] recognizing that the claim was a race claim and a sex claim. It did not recognize, however, that the sex claim was overt disparate treatment while the race claim was based upon both disparate impact and covert disparate treatment. The court simply accepted that Ms. Chambers' statistical evidence proved disparate impact without specifying whether the disparity was based upon race or sex.[130] Consequently, when it held that the lower court's finding, that the Role Model Rule was justified by the BND, was not clearly erroneous,[131] it impliedly held that the overt disparate treatment based upon sex was justified by the BND.[132] This reasoning is incorrect because disparate treatment on the basis of sex (pregnancy) requires the BFOQ defense to be lawful. The *Chambers* court acknowledged that the district court "did not clearly conclude that the [R]ole [M]odel [R]ule qualified as a [BFOQ] . . . ,"[133] and in the same paragraph of its

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dence of the exclusive focus on the black race is indicated by the following discussion which accompanied Title VII debate:

> In various regions of the country there is discrimination against some minority groups. Most glaring, however, is the discrimination against Negroes which exists throughout our Nation. Today, more that 100 years after their formal emancipation, Negroes, who make up over 10 percent of our population, are by virtue of one or another type of discrimination not accorded the rights, privileges, and opportunities which are considered to be, and must be, the birthright of all citizens.

Id. at 18, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS at 2393.

128. For the circumstances that led to the enactment of the Role Model Rule, see *supra* text and accompanying notes 68-69. For the text of the Role Model Rule, see *supra* note 68.

129. Chambers v. Omaha Girls Club, Inc., 834 F.2d 697, 700 (8th Cir. 1987).

130. *Id.* at 701. A recent note also has failed to make this distinction. *See* Note, *Do Unwed Pregnant Mothers Constitute Negative Role Models? Chambers v. Omaha Girls Club*, 21 CREIGHTON L. REV. 1119 (1988). Even though this author challenges the court of appeals' failure to recognize the difference between the BND and the BFOQ, she does not mention or notice that disparate impact is based upon race and disparate treatment is based upon sex. *Id.* at 1141.

131. *Chambers*, 834 F.2d at 703.

132. "The district court found that the [R]ole [M]odel [R]ule [was] justified by business necessity because there [was] a manifest relationship between the Club's fundamental purpose and the [R]ule." *Chambers*, 834 F.2d at 701. The court held that the district court's account of the evidence was plausible, making the Role Model Rule lawful as a BND. *Id.* at 702. Therefore, since the Role Model Rule was facially discriminatory, the court, in effect, held that intentional sexual discrimination was justified by the BND.

One student note also found fault with justifying disparate treatment claims with the BND. *See* Note, *Chambers v. Omaha Girls Club, Inc.: The Eighth Circuit Opens the Door to Pregnancy Based Discrimination*, 3 ST. JOHN'S J. OF LEGAL COMMENT 197, 211 (1988).

133. *Chambers*, 834 F.2d at 704.

opinion, the *Chambers* court stated that an intentional violation of Title VII requires a BFOQ.[134]

Notwithstanding this inaccurate analysis, however, the court ultimately concluded that the Role Model Rule was justified by the BND and also was a BFOQ.[135] If the Role Model Rule were a BFOQ, then the dismissal of the sex claim was proper, even though the race and sex claims were confused. This is not true, however, with respect to the race claim.

Ms. Chambers argued that the district court erred in not finding disparate treatment.[136] Ms. Chambers' attempt to prove disparate treatment was made through the process of showing disparate impact and then proving that the employer's business reasons were pretextual.[137] The court of appeals said that even if disparate treatment had been shown through this analysis, the dismissal was still proper because the Role Model Rule was also a BFOQ.[138] However, the disparate impact-to-disparate treatment analysis that Ms. Chambers proposed was directed at proving racial discrimination. When Ms. Chambers introduced the statistical evidence of higher rates of pregnancy among black women[139] to show disparate impact on a protected group, she showed *racial* discrimination. It was not *women* who were adversely affected, it was *black* women.[140] If, as the court seems will-

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134. *Id.* This statement is true only with respect to sex. See *supra* note 32 for evidence that the BFOQ cannot be applied to race discrimination.

135. The *Chambers* court said that:

> Even if the district court erred in finding no discrimination under the disparate treatment theory, our conclusion that the [R]ole [M]odel [R]ule is a [BFOQ] means that there can be no violation of Title VII. Moreover, the *per se* intentional discrimination approach advocated by Chambers simply eliminates the burden-shifting procedure . . . leaving the [BFOQ] exception as the employer's only defense. Thus, our conclusion on the [BFOQ] issue also would prevent Chambers from prevailing under her proposed *per se* intentional discrimination approach.

Id. at 704 n.18.

136. *Id.* at 703.

137. Chambers v. Omaha Girls Club, 629 F. Supp. 925, 946-48 (1986). See *supra* notes 25-29 for a discussion of the Supreme Court case where this method of proving disparate treatment is described.

138. *Chambers*, 834 F.2d at 703, 704 n.18.

139. Chambers v. Omaha Girls Club, 629 F. Supp. at 949 n.44.

140. *Id.* at 932-34. Chambers alleged intentional race discrimination under 42 U.S.C. § 1981. The trial court found no evidence of intentional race discrimination and dismissed the claim. *Id.* at 934. Consequently, when the trial court discussed the Title VII claims, it began by limiting its discussion of race discrimination to the disparate impact that the Role Model Rule may have on black women. *Id.* at 943. It felt that section 1981 barred a finding of covert disparate treatment with respect to race. Chambers, however, argued that the finding on intentional racial discrimination was an error. *Chambers*, 834 F.2d at 704 n.18.

ing to assume,[141] Ms. Chambers had succeeded in proving covert racial disparate treatment, she should have prevailed. The law is clear that the BFOQ is not an affirmative defense for racial disparate treatment.[142]

To avoid confusing the theories, courts can use the following simple analytical framework. First, courts should separate the evidence that supports the race claim from the evidence that supports the sex claim. Second, if the evidence pertaining to sex discrimination proves disparate impact, then the employer can avoid liability by successfully asserting the BND. If the evidence proves disparate treatment, then the defendant/employer must prove a BFOQ to avoid liability. Third, courts should follow the same steps for the race claim. In the race claim, however, if the plaintiff/employee proves disparate treatment, the employer cannot use a BFOQ to justify the discrimination.[143]

B. *The Court's Failure to Apply the Judicially Indicated Standards for Finding Business Necessity or Bona Fide Occupational Qualification*

1. Finding the Business Necessity Defense

In making the determination that the Role Model Rule was a BND, the court of appeals purported to subject the Role Model Rule to tests formulated by the Supreme Court in *Griggs* and *Washington v. Davis*.[144] While the *Chambers* court accurately identified the tests, the Girls Club did not meet its burden of proof for passing those tests based upon the facts of *Chambers*.

The Supreme Court stated that employment practices which have a disparate impact on a protected class must be manifestly related to the employment in question[145] and must be validated in terms of job performance.[146] The Girls Club offered as its proof of "manifest relationship" that it "honestly believed" that the presence of single, pregnant staff members would convey the impression of condoning

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141. *Id.*

142. 42 U.S.C. § 2000e-2(e) (1982). For the text of the statute that lists religion, sex, and national origin as the only classifications that are subject to the BFOQ justification, see *supra* note 30. For legislative history of the BFOQ indicating that it was not meant to apply to race, see *supra* note 32.

143. EEOC Compl. Man. (BNA) § 625.1 (1982) ("The protected class of race is not included in the [BFOQ] statutory exception and clearly cannot, under any circumstances, be considered a BFOQ for any job."). For further evidence that the BFOQ cannot be applied to race, see *supra* note 32.

144. *See supra* notes 96-105 and accompanying text.

145. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

146. Washington v. Davis, 426 U.S. 229, 247 (1976).

illegitimate teenage pregnancy.[147] By its own admission, the Girls Club had no data to support the relationship.[148] The *Chambers* court relied upon *Davis v. City of Dallas*[149] to underscore the notion that validation studies were not required. The *Davis* court, however, limited its holding to the specific facts of *Davis* in which human safety concerns justified using other means of judging qualifications.[150] The *Davis* court emphasized that when there are high economic and human safety risks involved in a job, there are verifiable ways to judge qualifications other than validating educational requirements.[151] Thus, the *Chambers* court's reliance on the lack of data was misguided because the *Davis* court's willingness to "relax the stringent validation requirements" was strictly limited to the evaluation of academic credentials.[152]

Assuming that expert testimony could substitute for verifying data, the Girls Club called an expert who testified that the Role Model Rule "*could be* . . . another viable way to attack . . . pregnancy."[153] This testimony, however, did not comply with standards set by the EEOC for establishing the need for single nonpregnant role models.[154]

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147. Chambers v. Omaha Girls Club, 629 F. Supp. at 950. *But see* EEOC v. Old Dominion Sec. Corp., 41 F.E.P. Cases 612, 617-18 (E.D. Va. 1986) (good faith subjective belief will not save an otherwise discriminatory decision).

148. Chambers v. Omaha Girls Club, 629 F. Supp. at 951 (stating that the Girls Club made the Role Model Rule in an attempt to limit teenage pregnancies but offers no data to support a finding that the Rule either does, or does not, accomplish this purpose).

149. 777 F.2d 205 (5th Cir. 1985), *cert. denied*, 476 U.S. 1116 (1986).

150. *Id.* at 218. In *Davis*, the challenged practice was the criteria used for selecting city police officers. *Id.* at 206. While expressing its willingness to allow the police force wide latitude in determining the qualifications of police officers because of the dangers of the job, the *Davis* court stated that "[b]ecause of the professional nature of the job, coupled with the risks and public responsibilities inherent in the position, we conclude that empirical evidence is not required to validate the job relatedness of the educational requirement. This is not to say, of course, that validation is not required." *Id.* at 217.

151. *Id.*

152. *Id.* at 217 n.12. The court of appeals also relied upon Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810 (8th Cir. 1983), to support its conclusion that statistical proof of a relationship between the Role Model Rule and teenage pregnancy was not required. *Chambers*, 834 F.2d at 702. In *Hawkins*, a female employee with only a high school degree was denied promotion to the position of materials control analyst which required a college degree. The *Hawkins* court stated that "validation stud[ies] would have strengthened the company's case," but could not "say . . . that validation studies [were] always required." *Hawkins*, 697 F.2d at 815-16. It restricted its holding, however, to "the facts of . . . [*Hawkins*]." *Id.*

153. *Chambers*, 834 F.2d at 702 n.14 (emphasis added).

154. The EEOC Compliance Manual discusses the BFOQ in specific types of claims. Section 625.8 sets out a detailed list of requirements that an employer must meet in order to prove that a "[s]ame-sex Role Model is a BFOQ." EEOC Compl. Man. (BNA) § 625.8 (1982). In the *Chambers* case, the "same-state-of-nonpregnancy" is analogous to "same-sex" because the PDA established that discrimination based on pregnancy is sex discrimi-

The EEOC directs that a court must find by a preponderance of evidence that the counselees have a psychological need for nonpregnant role models. This need must be medically verified in writing.[155]

In addition to its search for a justification for dismissing Chambers' claim after ignoring the need for validation studies and relying on inadequate expert witness testimony, the court of appeals tried to modify the manifest relationship standard to include a relationship to the employer's company goals. The court cited *New York City Transit Authority v. Beazer*[156] to support its argument that the Role Model Rule may be related to company goals rather than to the employment in question.[157] The use of *Beazer* arguably allowed the *Chambers* court to justify finding the BND because *Beazer* introduced the idea of manifest relationship to the goals rather than to the actual performance of the job as required by *Griggs*. The *Beazer* Court, however, was simply reaffirming the *Griggs* standard when it conceded to the *Beazer* trial court's findings that goals and safety can have a bearing on whether an employment policy is manifestly related to the employment in question.[158]

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nation. The Manual states that to determine whether a same-sex role model is a BFOQ, a court must:

> (1) Ascertain whether providing a same-sex role model to fill the psychological needs of clients is necessary to the normal operation of the employer's business.
>
> (2) Obtain medical evidence from the employer that the employer's clients have psychological need for a same-sex role model. This evidence is the main element in the same-sex role model investigation and must be in the form of a written statement or affidavit provided by a doctor, psychiatrist, or psychologist.

Id. § 625.8(a). While the expert witness in *Chambers* was a doctor, she testified that the counselees were likely to "do what they observe," but made no inference that the girls had a psychological need for nonpregnant role models. Chambers v. Omaha Girls Club, 629 F. Supp. at 951 n.52.

The standard of proof required by the EEOC Compliance Manual is stated in § 625.4(b)(5):

> A . . . finding [of discrimination] will result if the . . . employer fails to prove by a preponderance of the evidence that: (i) the essence of the business would be undermined by employing members of the excluded sex [single, pregnant staff members in our case], and (ii) all or substantially all members of the excluded sex are unable to perform the essential duties of the job in question.

EEOC Compl. Man. (BNA) § 625.4(b)(5) (1982).

155. EEOC Compl. Man. (BNA) § 625.8(a) (1982).

156. 440 U.S. 568 (1979).

157. *Chambers*, 834 F.2d at 701.

158. *Beazer*, 440 U.S. at 587 n.31.

2. Finding the Bona Fide Occupational Qualification

Even if the evidence offered by the Girls Club had been sufficient to establish the BND, the Role Model Rule still had to meet the tests for the BFOQ because it discriminated overtly against pregnant women.[159] The *Chambers* court, however, equated the standards for finding a BFOQ with the standards for finding the BND and erroneously concluded that the tests for the two defenses were the same.

Comparing *Dothard* to *Chambers* underscores a vast discrepancy between the Supreme Court standards for finding a BFOQ and the standards used by the court of appeals. Recall that the *Dothard* Court allowed the BFOQ defense only after a showing that the *essence* of the prison operation would be undermined if women employees were not fired. It demanded a *factual basis* for believing that no woman could perform the job safely and efficiently. In *Chambers*, the Girls Club's only evidence was the unsubstantiated "honest belief" in the efficacy of the Role Model Rule.[160] The Girls Club offered expert testimony, with validation, that the Role Model Rule may reduce the number of single pregnancies in counselees.[161] Moreover, the *Dothard* Court emphasized personal safety concerns as extreme as fear of rape and murder,[162] while in *Chambers*, the plaintiff worked in an innocuous setting, with no threat of danger beyond the undocumented possibility that her pregnancy would give an undesirable impression.

The court of appeals, however, did not compare *Dothard* to *Chambers*. It did not examine the Girls Club's evidence in light of the BFOQ language, its history, or its treatment by the EEOC. It avoided the entire issue, simply by proposing that the analysis of a BFOQ was "similar to and overlaps" the analysis of the BND.[163] It compared the tests for finding the BND and the BFOQ,[164] concluding that the tests for each defense were essentially the same.[165] For the court of appeals, it logically followed that if the Role Model Rule were a BND, and if the tests for finding the BND and for finding the BFOQ were the

159. The Role Model Rule was facially discriminatory and therefore required the BFOQ to be lawful. EEOC Compl. Man. § 604.10(c) (1981).

160. *Chambers*, 834 F.2d at 701.

161. *Id.* at 702 n.14.

162. Dothard v. Rawlinson, 433 U.S. 321, 334-37 (1977). The *Dothard* Court did not specifically state that safety concerns were always to be taken into consideration. It did underscore, in its statement of facts, that the conditions were extreme and the BFOQ should be used with extreme reservation.

163. *Chambers*, 834 F.2d at 704 (quoting Gunther v. Iowa Men's Reformatory, 612 F.2d 1079, 1086 n.8 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980)).

164. *Id.* at 704 n.19.

165. *Id.* at 704-05.

same, then the Role Model Rule was also a BFOQ.[166]

To compare the tests, the court said that in *Hawkins v. Anheuser-Busch, Inc.*,[167] the "manifest relationship to the employment in question" test is used to prove the BND.[168] Then, in its attempt to demonstrate the similarity between the BFOQ and the BND, the court pointed out that the test which was used to prove the BND in *Hawkins* also was used to prove the BFOQ in *Gunther v. Iowa State Men's Reformatory*.[169] Even though *Gunther* involved a BFOQ, it quoted *Griggs*, the seminal disparate impact case that first established the BND.[170] Thus, both the *Hawkins* and the *Gunther* courts associated the "manifest relationship to the employment in question" test with the BND. The *Chambers* court apparently thought that the "manifest relationship" test was used to prove a BFOQ in *Gunther*. The *Chambers* court's reasoning that the Girls Club proved a BFOQ because it proved the BND contained two errors. First, the Girls Club did not prove the BND. Second, the court mistakenly believed that the *Gunther* court used the "manifest relationship" test to find a BFOQ. The *Chambers* court's belief that the same manifest relationship proved both the BND and the BFOQ led that court to conclude, erroneously, that the same set of facts proves both defenses.

An examination of the respective uses of the BND and the BFOQ provides evidence that the two defenses are not the same. "In analyzing a BFOQ defense to a charge, it is important to distinguish between the BFOQ and business necessity. . . . The primary difference is that the BFOQ statutory exception allows an employer to *deliberately* discriminate on the basis of religion, sex, or national origin . . . ."[171] The BND is the proper defense for unintentional discrimination.[172] The BFOQ is the proper defense for intentional discrimination.[173] Because intentional discrimination implies greater culpability than unintentional discrimination,[174] for policy reasons, the BFOQ standard

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166. *Id.*

167. 697 F.2d 810 (8th Cir. 1983).

168. *Chambers*, 834 F.2d at 704.

169. *Id.* In *Gunther*, a female employee alleged that a men's state prison official discriminated against her on the basis of sex. *Id.* at 1081.

170. Gunther v. Iowa Men's Reformatory, 612 F.2d 1079, 1086 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980) (citing Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)).

171. EEOC Compl. Man. (BNA) § 604.10(c) (1981). *See also* Note, *supra* note 132, at 212 (stating that the BFOQ and the BND have mutually exclusive evidentiary foundations and are not properly consolidated by a court).

172. *Griggs*, 401 U.S. at 431.

173. 42 U.S.C. § 2000e-2(e) (1982). *See* EEOC Compl. Man. (BNA) § 604.10(c) (1981).

174. This proposition is an accepted moral notion or a societal judgment. For exam-

should be more rigorous than the BND standard. There is some support for this distinction in current case law. For example, statements made by the Supreme Court in *Dothard* imply more rigorous standards for establishing a BFOQ,[175] when compared with the milder statements about the BND made by the Court in *Griggs*.[176]

As recently as 1986, the Court of Appeals for the Eighth Circuit, the same circuit that decided *Chambers*, distinguished the two defenses by recognizing that the BFOQ was harder to prove than the BND. In *EEOC v. Rath Packing Co.*,[177] the Court of Appeals for the Eighth Circuit stated that the "business necessity defense . . . is appropriately raised when facially neutral employment practices have a disproportionate impact on protected groups. The BFOQ, on the other hand, is a defense to affirmative deliberate discrimination on the basis of sex."[178] Thus, in 1986, the *Rath Packing* court clearly implied that the BFOQ and the BND are different. Then, in 1987, the same court, deciding *Chambers*, reasoned that the BFOQ and the BND are so similar that they are interchangeable.

The Supreme Court provided additional evidence that the two defenses are different in *Wards Cove Packing Co. v. Atonio*.[179] The *Wards Cove* Court shifted the burden of persuasion back to the plaintiff/employee once the defendant/employer articulates its business reasons for causing disparate impact on that employee.[180] This effectively makes the BND much easier to prove than it was before *Wards Cove*. Admittedly, *Wards Cove* had not yet been decided when the Eighth Circuit dismissed Ms. Chambers' claim; nevertheless, the fact that the Court has made the BND so much easier to prove makes it

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ple, under the Model Penal Code, a criminal homicide is murder when "it is committed purposely or knowingly" (intentionally). Model Penal Code, § 210.2 (1985). The Model Penal Code provides that a person convicted of murder may be sentenced to death (the maximum penalty). *Id.* at § 210.6. An unintentional killing of another person, if accidental and without negligence, has no criminal or civil liability. This comparison illustrates the intuitive notion that greater responsibility (or culpability) attaches to intentional acts.

175. The BFOQ was an extremely narrow exception. *Dothard*, 433 U.S. at 334. The BFOQ is permissible only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively. *Id.* at 333. There must be a *factual basis for believing* that all or substantially all women would be unable to perform *safely and efficiently* the duties of the job in question. *Id.*

176. A business policy leading to disparate impact is unlawful if it cannot be shown to be related to job performance or shown to have a manifest relationship to the employment in question. Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971).

177. 787 F.2d 318 (8th Cir. 1986).

178. *Id.* at 327 n.10.

179. 109 S. Ct. 2115 (1989).

180. *Id.* at 2124.

even more improbable that the BND and the BFOQ were ever so similar that they were interchangeable.

In addition to this evidence that the defenses are not the same, the EEOC Compliance Manual specifically states the importance of distinguishing "between BFOQ and business necessity."[181] The manual says that the "BFOQ statutory exception allows an employer to *deliberately* discriminate on the basis of religion, sex, or national origin . . . . The business necessity defense [on the other hand] may be raised where a neutral employment criterion applied to all employees or applicants, has the *effect* of discriminating on the basis of race, color, religion, sex or national [origin]."[182]

By equating the two defenses, the court of appeals implied that it would allow intentional sex discrimination when the facts support the BND. Thus, the *Chambers* decision sets a precedent that is inconsistent with Title VII's purpose, with other court of appeals' decisions, and with the reasoning of the Supreme Court. Such a precedent may increase employee exposure to discrimination by broadening the tests for finding the BND and by equating the BND and the BFOQ.

CONCLUSION

In *Chambers*, the plaintiff alleged discrimination that was based upon two classes—race and sex—that are protected under Title VII. The BFOQ is the proper defense for intentional sex or pregnancy discrimination. It is specifically unavailable, however, for intentional race discrimination. The failure to analyze the race and sex claims separately may result in justifying race discrimination with a BFOQ. This result can be avoided by employing an analytical framework that segregates the evidence according to race or sex, determines which theory each piece of evidence supports, decides whether disparate impact or disparate treatment is proved for the race claim or for the sex claim, and applies the defenses accordingly.

In addition to the difficulty with separating the race claim from the sex claim, the *Chambers* court ruled that the Girls Club proved the BND even though the Girls Club failed to meet its burden of proof according to the standards set out by the Supreme Court. The *Chambers* court compounded the error by equating the tests for the BND and the BFOQ to find a BFOQ. These errors can be avoided by maintaining consistency with the Supreme Court's standards on burden of

181. EEOC Compl. Man. (BNA) § 604.10(c) (1981).
182. *Id.*

proof for each defense and by recognizing that the defenses are not the same: they have different uses and different standards of proof.

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